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Estabrook, Henry Dodge

“Some questions”

[New York]

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President Butler

"Some Questions"

308
Z
Box 26

An Address delivered by
Henry D. Estabrook, Esq.
of the New York Bar
at the Luncheon in honor of
His Excellency Charles S. Whitman
Governor of the State of New York
given by
The Lawyers' Club
on Saturday, the 30th day of January
one thousand nine hundred and fifteen
at
The Lawyers' Club
New York

Mar. 28, 1916-13 03

Mr. President, Your Excellency, Your ex-Excellency
and Fellow Members of the Lawyers' Club:—*

It seems to be the opinion of our Board of Governors that the Lawyers' Club should have a curriculum as well as a cuisine—an occasional Diet of Worms, so to speak, in addition to its diet of fricassees and commons. This is the second in that series of digests in aid of digestion which President Butler tells you will occur ever and anon—if not oftener. I'm disposed to doubt it, unless greater latitude in the choice of subjects is vouchsafed to the speakers honored by his selection. I accepted an invitation to talk awhile this afternoon because I thought I had something to say that ought to be said, even though it might stir up the animals. As if reading my zoological purpose in the alacrity of my acceptance, I was forthwith admonished that the Lawyers' Club is absolutely non-partisan and therefore it would never do to talk politics. That the Club is likewise non-religious; therefore it would never do to talk religion. That while we call ourselves a Lawyers' Club, at least fifty per cent of our members are laymen, so that the discussion of any law problem would be unintelligible to many and a bore to the others. As I felt these limitations closing in on me, I was reminded of the predicament of a certain Am-

* Joseph H. Choate, late Ambassador to Great Britain, who introduced Governor Whitman.

erican gentleman of Hebraic extraction who found himself in Russia and was told by a Russian policesky that he could not remain. "All right," said he, "then I will leave." "Have you a passport to leave?" he was asked. No, he hadn't. "Then, sir, you will not be permitted to leave. You may have twenty-four hours to make up your mind what you will do."

But brother Butler was good enough to suggest that, following up Prof. Taft's brilliant talk on National economy, it might be well for me to discuss the subject of State economy, with particular reference to the State of New York. Thanks awful. Prof. Taft made interesting a very dry subject because he spoke by the card and out of his own experience and personal knowledge. He is a man of vast experience and of encyclopedic knowledge. Indeed, since Mr. Taft has been transplanted from the President's chair to a professor's chair in college, he has become a sort of college on wheels—a whole University Extension Course in his own person, shedding light on a variety of obscure subjects. And parenthetically, I wish to add that the sportsmanlike good nature and philosophical patriotism with which Mr. Taft accepted his political defeat, the great benefits he still confers on his fellow citizens—his equipoise as well as his avoirdupois, have endeared him even to those who once thought themselves his enemies. Such ready and hearty acquiescence in the decrees of destiny would do credit to the corpulent Taft-like lover who plumped himself at the feet of his inamorata only to be rejected by her. "Oh, very well," said he, still on

his knees, "if you won't have me for a husband—please help me to my feet." Mr. Taft has recovered his footing all right and we all know that to a manly lover one rebuff is only inspiration for another try.

But I should be delighted to follow in the footsteps of Mr. Taft and discuss State economy this afternoon, except that I know nothing about economy in any of its phases. I admit that in this era of abstract reasoning mere unacquaintance with a subject is no disqualification for discussing it, or even dogmatizing concerning it. But I have a presentiment, founded perhaps on a hope, that this metaphysical, psychological era is passing, together with those who have put the "sigh" in sigh-cology.

As for Joseph H. Choate, he makes interesting any old thing he chooses to talk about—even governors. He could not be otherwise than interesting if he tried. But there is only one Joseph Choate in all the world, and we've got him! So, too, every new governor is interesting, and the newer he is the more interesting he is; for then he has all the innocence and promise of an infant upon whom have been devolved the duties and temptations of a man; and we fondly believe that the Honorable Charles is as good as his name—every whit man!

But limited as I am, naturally and artificially, what am I to talk about to enlist your interest and maintain it for the next three or four hours? Frankly, I don't know, and therefore I shall not talk at all. Permit me, instead, to ask you a few questions which, as Americans, you may answer to yourselves to suit

yourselves. No politics in that, is there? Can't trample anybody's toes merely by asking questions, can I? Besides, what are lawyers' toes for except to trample and be trampled?

Now, laying out of consideration all matters of police; laws creating—or perhaps now-a-days I should say recognizing class distinctions among our citizens; the paternalistic efforts of government to help the indigent, the ignorant, the improvident, the incompetent—in many respects commendable and of more or less promise; laying out of consideration all such measures, for example, as Mr. Untermyer has been advocating with his usual acumen and pertinacity, there remains the paramount, overshadowing fact that the Law Merchant, as known to us for more than two hundred years, has been stood on its head, and that the merchant *in propria persona* finds himself pretty much in the same attitude. And in this attitude, so favorable for rumination, he has been doing some tall thinking and is bound to put to his fellow citizens a few pertinent and possibly impertinent interrogatories.

I use the word "Merchant," of course, in its comprehensive and common-law sense, typified by the words "commerce" and "business." I have tried to induce in myself the merchant's frame of mind, without sharing his topsy-turvy outlook, or his rush of blood to the head, and I wish to ask you in all candor:

Has there ever been any pecuniary failure, misadventure or disappointment in your own business career, which, on analysis, you cannot trace to some

shortcoming in yourself, either moral, mental or temperamental?

If so be, can you point out to yourself or to others just wherein the laws and institutions of your country were at fault?

If you can, have such laws at any time or from time to time been remedied to your satisfaction?

Do you think that the Law Merchant, as now ossified and straight-jacketed in codes and statutes, is so superior to the elasticity of the common law to meet individual cases that you know henceforth just what you and all others may legally do or not do, and that your handicaps to success have been lowered or altogether removed?

You know, or possibly some of you do not know, just what the common law is, and how the Law Merchant was gradually developed according to its principles? Permit me to explain this briefly—by letting others talk. Here is what Mr. Justice Holmes has said in his lectures on the Common Law:

"The life of the law has not been logic: it has been experience."

And again he says of it: "Law, being a practical thing, *must* found itself on actual forces,"—such, for example, as the instinct for possession and self-advancement. And he adds: "Philosophy may find a hundred reasons to *justify* the instinct, but it would be totally immaterial if it should *condemn* it and bid us surrender without a murmur. As long as the instinct remains, it will be more comfortable for the law to satisfy it in an orderly manner, than to leave peo-

ple to themselves. If it should do otherwise, it would become a matter for pedagogues, wholly devoid of reality."

Think of that now! How do you suppose Justice Holmes, away back in 1881, ever conjured up such an awful contingency as making law a branch of pedagogics and so wholly devoid of reality?

But what the common law has striven always to do is precisely that—satisfy human instincts in an orderly manner according to the dictates of enlightened reason. Or as Alexander Pope puts it:

"Those rules of old discovered, not devis'd,
Are Nature's still, but Nature methodis'd:
Nature, like liberty, is but restrain'd
By the same laws which first herself ordained."

Hence Sir Edward Coke was fond of saying that "Reason is the life of the law; nay, the common law itself is nothing but reason."

And in the old case of *Coggs vs. Bernard* it was said: "Let us consider the reason of the case. For nothing is law that is not reason."

Does not that meet your ideas of what law ought to be? Do you know of any holier sanction—any higher test of the righteousness of conduct than its reasonableness? If reason abdicates, to what, in God's name, shall reason appeal? When a man is without reason we call him an idiot. Law without reason is tyranny, and a statute that is to be construed otherwise than in the light of reason is an idiot statute and necessarily bad law. Wendell Phillips

once declared that "the best use of good laws is to teach men to trample bad laws under their feet." He did not mean, I hope, that the individual was to interpret laws to suit himself and act on his personal notions of right and justice, for that would lead to anarchy. The function of interpreting law for the guidance of everybody is only for the courts, and demonstrates at once the necessity *for* courts and the inviolability of their decrees. President Grant said that he knew of no method to secure the repeal of bad or obnoxious laws so effective as their stringent execution. This is probably true in the long run. Certain of our laws, obnoxious to our merchants, are being stringently executed all right, all right—at great expense and in a deluge of words; but so far it has only served to reveal their absurdity. Perhaps it will some day result in their modification or repeal. Meanwhile, we will all join in singing that new battle hymn of the republic, "It's a Long Ways to Tipperary."

Let me further explain that prior to Lord Mansfield's time the Law Merchant was a law peculiar to itself. It was created by merchants and administered by them, just as our Stock Exchange has its own rules and its own forum for enforcing them. This Law Merchant was based on the customs of merchants in conducting their business, and these customs in turn grew out of their business experience. It was justice as the merchant saw it; and to his thinking of a higher, finer and more sensitive quality than that known to municipal law; for, as one ancient writer says: "The credit of merchants is so delicate and ten-

der that it must be cared for as the apple of a man's eye." You must bear in mind that all the earlier commentators on this law were not lawyers but merchants; for these old merchants had no use for lawyers except on rare occasions when they found themselves in court and their customs up for judicial investigation. On such occasions the issue was usually one of fact as to the existence or non-existence of a particular custom, and this issue the courts would dump into the jury-box with varying results.

Now, these old-time merchants had their "trade unions," their "pools," their "gentlemen's agreements," their combinations in restraint of trade; but all within limitations prescribed by their own customs, which customs from long experience they had found to be just and reasonable; for it seems to be a law of nature that antagonistic forces, in their clash and interaction, are bound to achieve some sort of an equilibrium; which in the case of moral forces we call justice. I find it hard to define justice except as a moral equilibrium.

I notice by this morning's paper the administration complains that it is already overburdened by the "duty of promulgating definitions for all business activities." I should think it might be. But is that a duty of any administration? I suggest that the burden could be lightened somewhat by turning the job of definition over to the courts, where it properly belongs, for in this workaday world, and so long as human instincts are what they are, we cannot hope to attain to everybody's ideal of justice, for every-

body has his own ideal; but only to a pragmatist definition and a working basis. Experience evolves its own definitions and, as I have shown, the law is based on experience and not on the categories of logic.

Because of this fact William Murray, when he came to the bench as Lord Mansfield, said to himself: These merchants of ours are good men—honest, honorable, great men—the best in the kingdom. They have carried our commerce over all the world and have made us famous as a trading nation. They have added to our national riches more than all our lords and nobles combined. Their laws and customs must be just and reasonable or they could not have won the friendship of those with whom they deal; nor would they themselves have acquiesced in them so long and with so little friction. If common law is only another name for common sense and the perfection of reason, then every custom of these merchants must find its analogue, its warrant, and its protection in the law of the realm. It shall be my mission to articulate this Law Merchant with the body of the law or destroy it utterly if found to conflict with fair and honorable dealing.

Wherefore, Justice Mansfield began to consort with merchants, visiting their Guilds, summoning them on Special Juries, everywhere probing into their business habits, their course of dealing and their reasons for their peculiar customs, which seemed to be common to all nations; with the result that there emerged from the courts a new law Maxim: LEX

MERCATORIA EST LEX TERRAE—the Law Merchant is the law of the land. That is to say, the common law adopted mercantile ethics as the standard of right and justice and the measure of legality. There was the rattling or dry juridical bones, the assaults of scholasticism, but the maxim persisted, and is part of the common law to-day: for Mansfield was a rare genius like our own John Marshall, which means that he was gifted with common sense—apparently the most uncommon gift in the bestowal of the Almighty. And this maxim embodied the law of our country when the so-called Sherman Act first came before the Supreme Court of the United States for judicial interpretation. Four of the justices of that Court, among them Justice White, declared that the act should be interpreted with reference to the common law—that is to say, in the light of reason; in which case the facts admitted by the demurrer would not have constituted an unreasonable restraint of trade, and the combination complained of would not have been illegal. Five of the justices declared that the act was intended to metamorphose the common law, and must be construed literally though the heavens fall; and of course the majority ruled. This ruling, in my humble opinion and with all deference, was one of the few colossal blunders ever committed by that great tribunal; for taken literally the Sherman Act is a blight on enterprise—a manufacturer of crimes without turpitude—a remedy worse than any disease it was supposed to palliate. But the act thus interpreted was seized upon by certain patriots and

purists to attack the great business interests of our country; to unscramble eggs—with what *soufle*, baby-custard effect you are all familiar. Merchants by the wholesale, fearful of a cataclysm, hastened to plead *nolo contendere* to indictments against them. No merchant dare speak with his enemy in the gate, or obey the scriptural injunction to agree with his adversary quickly, much less deliberately, without being guilty of a conspiracy and branded as an outlaw.

And yet Cicero, long ago, had declared that extreme law is extreme injustice: notwithstanding which truism the Sherman Act, together with the numerous progeny begotten by it—this extreme of law—is still enthroned, and business is still prostrate before it.

But let me ask you:

Do you believe the American merchants of to-day are more wicked by nature than the English merchants honored by Lord Mansfield's confidence?

Do you believe that the *ipse dixit* of a legislature can make a good man bad?

Aren't you tired of statutory crimes?

Does it not grieve you to see whole platoons of our merchant princes—men whom we are proud to know and delight to honor—who have filled the commercial world with the fame of their beneficent achievements—to see them filing into the prisoners' dock and pleading guilty to crimes that are not crimes in any other nation on earth—guilty of no act not sanctioned by the common law and its rule of reason?

Is not this an indictment of a whole people, which Burke thought to be impossible?

Are these men impeached by the spectacle; or rather does it not impeach the tyranny of the majority—what Tallyrand and de Tocqueville prophesied would become the besetting evil of our form of government? Oh, we are going to pull out of it, so don't understand me as deprecating our form of government. I admit that republics are as wicked as human nature; but they are also as good as human nature, and Kings and Czars and Things are no better!

Let me read to you what Pomeroy, one of our great American jurisconsults, says about our Law Merchant. Speaking of the Law Merchant as left by Mansfield, he says:

"The legislature has, in the meanwhile, done its part, and while it has not been slow to supply deficiencies and correct mistakes it has, hitherto, fortunately abstained from any vexatious interference with arrangements dictated by that best of legislators—Experience.

"The mercantile law of England is, in point of fact, an edifice erected by the merchant, with comparatively little assistance either from the courts or the legislature. The former have, in very many instances, only impressed with a judicial sanction, or deduced proper and reasonable consequences from those regulations which the experience of the trader, whether borrowing from foreigners or inventing himself, had already adopted as the most convenient. The latter, wisely reflecting that commercial men are notoriously the best judges of their own interests, have interfered as little as possible with their avocations,

have shackled trade with few of those formalities and restrictions, which are mischievous, if only on account of the waste of the time occupied in complying with them. The mercantile law of England is perhaps, of all laws in the world, the most completely the offspring of usage and convenience, the least shackled by legislative regulations. . . . It is, perhaps, in consequence of this that we find such high and peculiar sentiments of commercial honor prevalent among English merchants. . . .

"These and such as these are the reflections which have rendered the author of this work exceedingly averse from any idea of reducing our commercial system into a code, by which the energies of the mercantile community would, he apprehends, be shackled and preventing them from operating, as they now most usefully do, upon the law, and working out its improvement, without assistance from the legislature. A criminal code would be of great utility, for the rules of criminal law ought to be not only definite, but inflexible, incapable of extension, save by the supreme power of the State. . . . The codification of the law of real property is not worth seeking for. . . . But the codification of our mercantile law would be a national evil. It would destroy the singular and fortunate plasticity of a system whose rules hitherto have been, and always ought to be, made by the merchant and dictated by his exigencies."

I am afraid I have been doing a little talking on my own account; but only enough to give point and

direction to my questions which, to round out to a conclusion, let me ask:

Would you not like to see some great American, who looms big in public life, stand forth before all the people and shake his fist in their faces, calling them ingrates and growlers, unworthy of their blessings, reaping to-day only what they have sown in ignorance and anger?

Would you not like to see him raise his face to heaven and thank God for the matchless boon of American citizenship under the Constitution given us by our fathers?

Aren't you tired of muckrakers and bellyachers and the caterwaul of malcontents who are forever screeching in our ears the words of Richard II:

"Let's talk of graves, of worms and epitaphs;
Make dust our paper, and with rainy eyes
Write sorrow on the bosom of the earth."

If they would only add the rest of the sentence now—"Let's choose executors and talk of wills"—wouldn't we almost forgive them?



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